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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-1082
(D.C. No. 01-N-1811)
(D. Colo.)

ALLEN OIL & GAS, LLC,

Plaintiff-Appellant,

v.

MICHAEL KLISH; BRUCE JOHNSON;
DANIEL SKRABACZ; ADRAN PHILLIPS,

Defendants-Appellees.

[ENTERED: OCTOBER 26, 2004]

ORDER AND JUDGMENT*

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**,
Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Allen Oil & Gas, LLC, appeals the judgment of the district court dismissing its § 1983 complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) and further refusing to grant plaintiff leave to amend its complaint. We exercise jurisdiction pursuant to 28 U.S.C. § 1332 and affirm.

Plaintiff was the operator of oil leases located in Routt County, Colorado. In the complaint, defendants are identified as members of the board of the Colorado Oil and Gas Conservation Commission (Commission). Plaintiff brought suit under 42 U.S.C. § 1983 alleging that defendants affected a taking of its property without due process in derogation of the Fifth Amendment when the Commission ordered some of plaintiff's wells plugged. Specifically, plaintiff alleged, *inter alia*, that defendants denied it the opportunity for a hearing before an impartial tribunal, prevented it from complying with Commission regulations, and continued a hearing without written notice to plaintiff.

In ruling on defendants' renewed motion to dismiss the complaint, the district court held that because plaintiff failed to allege any personal participation by defendants in the allegedly illegal acts, its complaint was subject to dismissal under Rule

12(b)(6). Because the court found it "patently obvious that the plaintiff cannot prevail under the alleged facts," Aplt. App. at 164, it further denied leave to amend the complaint. Alternatively, the court held that defendants were shielded by qualified immunity.

Plaintiff takes issue with all three of these conclusions. We need not address the qualified immunity issue, however, because we find no error in the dismissal for failure to state a claim and in the refusal to allow amendment.

> This court reviews de novo the district court's dismissal under Rule 12(b)(6) for failure to state a claim. We accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party. The district court's dismissal pursuant to Rule 12(b)(6) will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998) (citations and quotation omitted).

In order to state a claim for relief under § 1983, plaintiff must show an affirmative link between defendants' conduct and the alleged constitutional violation. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1156-57 (10th Cir. 2001). Here, the

complaint makes no link between these individual defendants and the acts complained of. The complaint identifies defendants as members of the Commission, Aplt. App. at 8, but does not identify them as members of the Commission during the relevant time period.[1] The complaint does not allege how any or all of the defendants voted on matters concerning the wells. The complaint does claim that activities of a particular employee of the Commission injured plaintiff, but that individual is not named as a defendant. Further, there is no allegation that any of the defendants personally considered the allegedly improper intervention of this employee or allowed it to influence them.

In its opening brief, plaintiff correctly cites the law requiring personal participation in this type of suit but fails to ultimately show that defendants were directly involved in the acts that resulted in the claimed deprivation of rights. Merely saying that it has shown individual involvement on the part of each defendant does not make it so. *See* Aplt. Br. at 17-18.

Plaintiff also correctly points to various theories of recovery which would state a claim for relief had the correct defendants been named or had these defendants been affirmatively linked to the alleged harm that befell plaintiff. Without the personal participation by each defendant, however, plaintiff's theories are of no avail. Plaintiff cites *Barrett v. Tallon*, 30 F.3d 1296, 1299 (10th Cir. 1994), for the proposition that even if the factual allegations made in a complaint

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[1] The statement in plaintiff's opening brief that the complaint alleged defendants *were* members of the Commission is inaccurate. *See* Aplt. Br. at 16.

fail to support the legal theory underlying the plaintiff's case, dismissal is inappropriate. In *Barrett*, this court reversed a dismissal under Rule 12(b)(6) because, while the plaintiffs failed to state a RICO claim, they had adequately pleaded claims of "garden variety" fraud and conversion. There is no indication in *Barrett*, however, that the plaintiffs either failed to name the correct defendants or failed to allege personal participation by them.

Plaintiff's citation to *Stidham*, 265 F.3d 1144, is similarly unavailing. In *Stidham*, one of the defendants, the director of Utah's Peace Officer Standards and Training Division, argued that the claims against him must be dismissed because the plaintiff had failed to allege an affirmative link between his conduct and any constitutional violation. This court clarified that such a link is required to be alleged in the complaint as well as proven at trial. *Id.* at 1157. We refused to affirm the dismissal of the complaint against the director, however, because the plaintiff had sufficiently alleged wrongdoing on the part of the defendants as a group and had defined the director as part of that group. *Id.*

Although not part of the published opinion in *Stidham*, the complaint there clearly alleged that the defendant director was the director at the time of the acts complained of.[2] The complaint in the case at bar does not make a similar allegation as to the named defendants and therefore does not state a claim upon which relief can be granted.

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[2] We have ascertained this fact by taking judicial notice of the appellate record in *Stidham* which is still on file in this court.

Finally, plaintiff argues that the district court erred in refusing to grant it leave to amend the complaint. In declining to grant leave to amend, the district court began by noting that defendants had pointed out plaintiff's failure to allege personal participation when they filed their motion to dismiss in the Southern District of Texas. Briefing on that motion was complete before the case was transferred to Colorado. We also note that defendants made the same argument in their renewed motion to dismiss filed in the district court on December 19, 2001. At the time of the district court's ruling here, January 24, 2003, discovery in the case was complete and the deadline for filing dispositive motions had passed without any request from plaintiff to amend the complaint. The district court concluded that "it is patently obvious that the plaintiff cannot prevail under the alleged facts and that an opportunity to amend would be futile." Aplt. App. at 164. We review this conclusion de novo. *Watson ex rel. Watson v. Becker*, 242 F.3d 1237, 1239 (10th Cir. 2001).

We have reviewed the pleadings on file in this case and the other materials of record and agree that granting leave to amend would be futile. As noted above, plaintiff does not allege any personal participation by any of the defendants in its alleged injury. Plaintiff does not dispute that three of the four defendants were not members of the Commission in March 1999 when the wells were ordered plugged. Despite being on notice that defendants would raise the issue of lack of personal participation, plaintiff did not request leave to amend its complaint until the district court was prepared to rule on defendants'

renewed motion to dismiss. Even then, the district court found the request to be rather opaque: "There is some suggestion in the papers that the plaintiff should be given leave...to replead." Aplt. App. at 163. Further, plaintiff does not indicate in its filings in this court how it would amend the complaint to cure the noted defect. Under these circumstances, we find no error in the refusal of the district court to grant leave to amend.

The judgment of the district court is AFFIRMED.

Entered for the Court

Michael W. McConnell
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 01-N-1811 (MJW)

ALLEN OIL & GAS, LLC,

Plaintiff,

v.

MICHAEL KLISH,
BRUCE JOHNSON,
DANIEL SKRABACZ, and
ADRAN PHILLIPS, Individually,

Defendants.

[ENTERED: JANUARY 30, 2003]

FINAL JUDGMENT

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

1. Pursuant to the findings of fact and conclusions of law entered orally in open court by Judge Edward W. Nottingham on January 24, 2003:

a. Defendants' Motion to Dismiss Complaint (#8), filed December 19, 2001, is GRANTED.

b. Defendants' motion for summary judgment (#31), filed June 28, 2002, is DENIED as MOOT.

c. Judgment is entered in favor of Defendants Michael Klish, Bruce Johnson, Daniel Skrabacz, and Adran Phillips and against Plaintiff Allen Oil & Gas, LLC, and Plaintiff's Complaint and this action are DISMISSED with prejudice.

6. Defendants shall have their costs upon the proper filing of a Bill of Costs within eleven days of January 24, 2003, the date of the court's order

Dated this 30 day of January, 2003.

APPROVED BY THE COURT:

/s/
EDWARD W. NOTTINGHAM
United States District Judge

ENTERED FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

By /s/
Stephen P. Ehrlich
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Final Judgment signed by Judge Edward W. Nottingham on January 30, 2003 was served on January 30, 2003 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

Magistrate Judge Michael J. Watanabe*

Claude T. Allen, Sr., Esq.
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D.C. Box No. 20
Attorney for Defendants

JAMES R. MANSPEAKER, CLERK

By /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-01-1004

ALLEN OIL & GAS, LLC,

Plaintiff,

v.

MICHAEL KLISH, BRUCE JOHNSON,
DANIEL SKRABACZ, AND
ADRAN PHILLIPS, Individually,

Defendant.

[ENTERED: SEPTEMBER 5, 2001]

MEMORANDUM AND ORDER OF TRANSFER

Pending is Defendants' Motion to Dismiss Or, in the Alternative, Motion to Transfer (Document No. 3). After having reviewed the motion, responses, reply, and applicable law, the Court concludes that the motion to transfer should be GRANTED.

I. Background[1]

Plaintiff Allen Oil & Gas, which operated oil leases in the State of Colorado, brought this action against members of the Oil and Gas Conservation Commission of the State of Colorado (the "Commission") individually after some of Plaintiff's Colorado oil wells were plugged at the order of the Commission. The Commission is a regulatory agency that governs the production of oil and gas in the State of Colorado. Plaintiff owned oil wells and leases in Colorado, in fields known as Tow Creek Field and Buck Peak Field. The Commission determined that some of Plaintiff's Tow Creek Field wells did not comply with the Commission's regulations, and after holding hearings on the issue, ordered the allegedly noncompliant wells plugged. The Commission also ordered Plaintiff to pay a fine and to post further bond with the Commission to continue operation of its wells in Buck Peak Field. The Commission later determined that Plaintiff's Buck Peak Field wells were uneconomic, and ordered these wells plugged as well. Plaintiff filed this action under 42 U.S.C. § 1983 against the individual members of the Colorado Commission for alleged violations of Plaintiff's substantive and procedural due process rights and for taking property without just compensation. Defendants are residents of the State of Colorado, and Plaintiff does not contend that Defendants' actions occurred outside of Colorado.

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[1] In determining Defendant's motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, the Court is required to accept all of Plaintiff's uncontroverted allegations as true and construe conflicting evidence in favor of Plaintiff. *See* Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 215 (5th Cir. 2000). This statement follows that standard.

II. Subject Matter Jurisdiction

Preliminarily, the Court addresses Defendants' challenge to the Court's subject matter jurisdiction on Eleventh Amendment immunity grounds. The Eleventh Amendment of the United States Constitution bars claims in federal courts against states and state officials in their official capacities. U.S. CONST. amend. XI; Kentucky v. Graham, 105 S. Ct. 3099, 3107 (1985). This bar is jurisdictional in nature. Edelman v. Jordan, 94 S. Ct. 1347, 1363 (1974); Burge v. Parish of St. Tammany, 187 F.3d 452, 465 (5th Cir. 1999); McDonald v. Bd. of Mississippi Levee Comm'rs, 832 F.2d 901, 906 (5th Cir. 1987). However, the Eleventh Amendment does not deprive federal courts of their jurisdiction over claims against state officials in their individual capacities. Hafer v. Melo, 112 S. Ct. 358, 365 (1991); Wilson v. UT Health Ctr., 973 F.2d 1263, 1271 (5th Cir. 1992).

Although Plaintiff sues Defendants in their individual capacities, Defendants contend that the Complaint is based on actions taken by Defendants in their official capacities as members of the Commission. Therefore, Defendants argue, Plaintiff's action is actually an official capacity suit against the State of Colorado. State officials can be held liable in their individual capacities for actions taken in their official capacities. Hafer, 112 S. Ct. at 363. The mere fact that Defendants acted as members of the Commission does not, therefore, either preclude Plaintiff from bringing individual capacity claims against Defendants or transform its claims into official capacity claims. Because Plaintiff clearly attempts to hold Defendants

liable only in their individual capacities, which the Eleventh Amendment does not bar, the Court has subject matter jurisdiction over Plaintiff's claims. *See* Hafer, 112 S. Ct. at 365. ("The Eleventh Amendment does not bar such suits [against state officials in their individual capacities], nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts.").

III. Personal Jurisdiction

A federal court may exercise jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) the exercise of such jurisdiction comports with due process under the United States Constitution. *See* Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 418 (5th Cir. 1993). Because the Texas long-arm statute has been interpreted to extend as far as due process permits, the sole inquiry is whether the exercise of personal jurisdiction over a nonresident defendant comports with federal constitutional due process requirements. *See* id.

"Exercise of personal jurisdiction over nonresident defendants satisfies due process when two requirements are met." Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 294 (5th Cir. 1999). First, the defendant must have "purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2183 (1985) (*quoting* International Shoe Co. v. Washington, 66 S. Ct. 154, 158 (1945)). The "defendant's conduct and connection with the forum State [must be] such that [it]

should reasonably anticipate being haled into court there." Id. (*quoting* World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 567 (1985)). Even if such contacts are present, "these factors must be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Id. at 2184.

Two types of personal jurisdiction are recognized: "specific" and "general." Specific jurisdiction exists when the cause of action relates to or arises out of the defendant's contacts with the forum. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868, 1872 n.8 (1984). Even a single act can support specific jurisdiction "[s]o long as it creates a substantial connection with the forum." Burger King, 105 S. Ct. at 2184 n.18 (internal quotations omitted). Alternatively, a State may exercise general jurisdiction over a defendant even though the lawsuit does not arise out of or relate to the defendant's contacts with the forum. *See* Helicopteros, 104 S. Ct. at 1872 n.9. For general jurisdiction to exist, due process requires that the nonresident's contact with the forum State be substantial, continuous, and systematic. Alpine View Co. Ltd. v. Atlas Copco AB, 205 F.3d 208, 217 (5th Cir. 2000).

"When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985). Because no evidentiary hearing has been held in this case, however, Plaintiff bears the burden of presenting a

prima facie case of personal jurisdiction, and proof by a preponderance of the evidence is not required. *See* Kelly v. Syria Shell Petroleum Development B.V., 213 F.3d 841, 854 (5th Cir. 2000). A plaintiff may present a *prima facie* case by producing admissible evidence which, if believed, would suffice to establish the existence of personal jurisdiction. *See* WNS, Inc. v. Farrow, 884 F.2d 200, 203 (5th Cir. 1989). Uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits and other evidence must be construed in the plaintiff's favor. *See* Alpine View, 205 F.3d at 215.

Plaintiff argues that Defendants established minimum contacts with the State of Texas through communications, telephone calls, and orders sent by the Commission to Plaintiff and Plaintiff's agent in Texas. Plaintiff does not contend that the contents of these communications gave rise to its cause of action or that Defendants directed their conduct toward activities in Texas, nor has Plaintiff either alleged or produced evidence which would support such a contention. *See* Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 213 (5th Cir. 1999); Marathon Oil, 182 F.3d at 295. Without more, Defendants' exchange of communication on behalf of the Commission with a Texas limited liability company is not sufficient to support the exercise of jurisdiction over Defendants in Texas. *See* Marathon Oil, 182 F.3d at 295 (presence in Texas for three meetings, correspondence, and phone calls not sufficient to establish minimum contacts); Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 778 (5th Cir. 1986) (exchange of communications in course of

developing contract did not establish minimum contacts); Hydrokinetics, Inc. v. Alaska Mech., Inc., 700 F.2d 1026, 1029 (5th Cir. 1983) (exchange of communications during development of contract not sufficient in itself to be characterized as purposeful activity invoking benefits and protections of forum state's laws). Defendants, as residents of Colorado and members of a Colorado regulatory agency, could not reasonably foresee being haled into a Texas court for their actions outside of Texas and relating to Colorado oil wells merely because they directed the Commission's communications with the wells' owner to the owner's place of business, which happened to be Texas. Such contacts with Texas are too random to establish personal jurisdiction over Defendants, as they rest entirely on the fortuity that the Colorado wells at issue were owned by an entity that received its mail in Texas. *See* Patterson v. Dietze, Inc., 764 F.2d 1145, 1147 (5th Cir. 1985). Because Plaintiff has failed to establish a prima facie case of personal jurisdiction over Defendants, the Court does not reach the remaining issues raised by Defendants, but turns to the issue of whether this case should be dismissed for lack of personal jurisdiction, or transferred to the District of Colorado.

IV. Alternative Requests to Transfer Venue

Plaintiff and Defendants have both requested in the alternative that this case be transferred to the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1406(a). Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or

district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). A court can transfer rather than dismiss a case under § 1406(a) even where the court lacks personal jurisdiction over the defendant. *See* Goldlawr, Inc. v. Heiman, 82 S. Ct. 913, 915-16 (1962).

Venue is improper in this district where none of Defendants resides and where none of the events occurred that give rise to this suit. On the other hand, all Defendants reside in the District of Colorado and it is there that all or a substantial part of the events or omissions giving rise to the claim occurred. *See* 28 U.S.C. § 1391(b). As residents of Colorado, all Defendants are subject to personal jurisdiction there. In the interests of justice, the Court will transfer this action to the United States District Court for the District of Colorado.

V. Order

Based on the foregoing, it is

ORDERED that this cause is TRANSFERRED pursuant to 28 U.S.C. § 1406(a) to the United States District Court for the District of Colorado, and the Clerk of the Court will effect such transfer.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, this 4th day of September, 2001.

/s/
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-1082

ALLEN OIL & GAS, LLC,

Plaintiff - Appellant,

v.

MICHAEL KLISH; BRUCE JOHNSON;
DANIEL SKRABACZ; ADRAN PHILLIPS,

Defendants - Appellees.

[ENTERED: DECEMBER 29, 2004]

ORDER

Filed December 29, 2004

Before **McCONNELL, HOLLOWAY** and **PORFILIO,**
Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk